IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.8.2007

C O R A M

The Honourable Mr. Justice M.JAICHANDREN

S.A.No.2268 of 2003

1. S.Azhagesan
2. Dayalu Ammal
3. Karunanidhi
4. Pandian
5. Neelavathi
6. Amirthavalli .. Appellants

Versus

Thangavelu .. Respondent

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PRAYER : Second Appeal against the judgment and decree dated 20.6.2003 in A.S.No.3 of 2001 on the file of the Sub Court, at Tiruvarur, reversing the judgment and decree, dated 19.10.2000 made in O.S.No.217 of 1998, on the file of the District Munsif Court, Thiruthuraipoondi.

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For Appellants : Mr.Srinath Sridevan

For Respondent : Mr.Sathia Murthi

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J U D G M E N T

The second appeal has been filed against the judgment and decree, dated 20.6.2003, made in A.S.No.3 of 2001, on the file of the Sub Court, Tiruvarur, reversing the judgment and decree, dated 19.10.2000, made in O.S.No.217 of 1998, on the file of the District Munsif Court, Thiruthuraipoondi.

2. The second defendant in the suit O.S.No.217 of 1998, on the file of the District Munsif Court, Thiruthuraipoondi, who was the second respondent in A.S.No.3 of 2001, on the file of the Sub Court, Tiruvarur, along with the respondents 3 to 7 in the said appeal are the appellants in the present second appeal in S.A.No.2268 of 2003 before this Court.

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3. The suit in O.S.No.217 of 1998, had been filed by the plaintiff for the relief of bare injunction. The property in question is 0.11 acres of dry land in Survey No.1333/1A at Karayankadu Village in Thiruthuraipoondi Taluk. The suit in O.S.No.217 of 1998, had been dismissed by the District Munsif Court, Thiruthuraipoondi, by its judgment and decree, dated 19.10.2000.

4. Aggrieved by the judgment and decree of the trial Court, the respondent in the present second appeal had preferred an appeal before the Sub Court, Tiruvarur, in A.S.No.3 of 2001. The lower appellate Court had reversed the judgment and decree, dated 19.10.2000, made in O.S.No.217 of 1998, and had decreed the suit, by its judgment and decree, dated 20.6.2003. Aggrieved by the judgment and decree of the lower appellate Court, dated 20.6.2003, the present second appeal has been preferred by the appellants.

5. The suit had been filed by the plaintiff stating that the plaintiff and his family members have been in possession and enjoyment of the suit property for a long period of time. No one else including the defendants have ever been in enjoyment of the suit property. Since the defendants had tried to interfere with the peaceful possession and enjoyment of the suit property by the plaintiff on an earlier occasion, the plaintiff had filed the suit in O.S.No.225 of 1993. Since the plaintiff was unwell, he could not be present in Court during the assigned date fixed for the hearing of the suit and therefore, the said suit had been dismissed for non-prosecution, on 17.4.1996. However, the plaintiff has been constrained to file the suit in O.S.No.217 of 1998, due to the constant threat by the defendants and their men by their attempts to disturb the peaceful possession and enjoyment of the suit property by the plaintiff.

6. The defendants in the suit had denied the claims made by the plaintiff and had stated that the suit property belonged to them. Since the plaintiff had disputed the title of the defendants with regard to the suit property, the plaintiff ought to have filed a suit for declaration and not for a bare injunction.

7. It was also stated by the defendants that the suit cannot be sustained in law, since the description of the boundaries of the suit property was wrong. The defendants had also stated that since the earlier suit filed by the plaintiff in O.S.No.225 of 1993, had been dismissed for non-prosecution, it is not open to the plaintiff to file a fresh suit once again for the same cause of action, as it would be hit by the principal of res judicata.

8. Based on the rival claims made on behalf of the plaintiff as well as the defendants, the trial Court had framed the following issues for consideration:

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"1. Whether the suit is maintainable?

2. Whether it is true that the suit property was possessed by the plaintiff and was under his enjoyment at the time of suit?

3. Whether the relief of permanent injunction as prayed for in respect of the suit property is to be granted to the plaintiff?

4. What other reliefs the plaintiff is entitled to in the suit?"

9. The trial Court, after framing the relevant issues for consideration and based on the averments made on behalf of the plaintiff and the defendants, had dismissed the suit, accepting the contentions raised on behalf of the defendants, by its judgment and decree, dated 19.10.2000.

10. Aggrieved by the judgment and decree of the District Munsif Court, Thiruthuraipoondi, dated 19.10.2000, made in O.S.No.217 of 1998, the plaintiff in the suit had filed an appeal in A.S.No.3 of 2001, before the Sub Court, Tiruvarur.

11. The lower appellate Court had framed the following points for consideration:

"1. Whether the appeal can be allowed by setting aside the judgment and decree of the trial Court?

2. What reliefs the appellant is entitled to?"

12. Based on the averments made on behalf of the plaintiff as well as the defendants and on the evidence available on record, the lower appellate Court had allowed the appeal and decreed the suit in favour of the plaintiff holding that the plaintiff has been in possession and enjoyment of the suit property and that the defendants and their men have no right to interfere with the plaintiff's peaceful possession and occupation of the said property.

13. Therefore, the present second appeal has been preferred by the defendants in the suit stating that the lower appellate Court had erred in ignoring the mandatory provisions of Order 9 Rule 9(1) of The Civil Procedure Code, 1908, even if could be taken that the principal of res judicata would not apply to the present case.

14. It was also stated that it was wrong on the part of the lower appellate Court to have held that the kist receipts in Exhibits A.1 to A.15 would be sufficient to prove the plaintiff's

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possession. Since the plaintiff had relied on the same patta in filing the earlier suit in O.S.No.225 of 1993, the present suit in O.S.No.217 of 1998, is not maintainable in law.

15. It was also stated that the lower appellate Court had wrongly cast the burden of proof on the defendants in a claim for bare injunction by the plaintiff. When the question of title to the suit property had been raised by the defendants, the plaintiff ought to have filed a suit for declaration of title and not a suit for bare injunction as in the present case.

16. The present second appeal had been admitted on the following substantial questions of law:

> "Whether the dismissal of an earlier suit between the parties on the same cause of action for default will not bar a fresh suit on the same cause of action?"

17. At the stage of the hearing of the second appeal, the learned counsels appearing on behalf of the appellants as well as the respondent had submitted that since the lower appellate Court had not considered the issue as to whether the suit in O.S.No.217 of 1998 was maintainable, in view of Order 9 Rule 9(1) of The Civil Procedure Code, 1908, it would only be appropriate for the lower appellate Court to adjudicate upon the same and therefore, it would be proper for this Court to remit the matter back to the lower appellate Court for considering and adjudicating upon the said issue.

18. In such circumstances, the judgment and decree of the Sub Court, Tiruvarur, dated 20.6.2003, in A.S.No.3 of 2001, is set aside and the matter is remitted back to the lower appellate Court to consider and decide the issue relating to Order 9 Rule 9 (1) of The Civil Procedure Code, 1908, taking into consideration the facts and circumstances of the case, on merits and in accordance with law and come to a conclusion, after giving sufficient opportunity to the parties concerned, within a period of three months from the date of receipt of a copy of this Judgment. However, it is made clear that during the pendency of the matter before the lower appellate Court, the appellants as well as the respondent would maintain the position of status quo as on the date of the passing of this Judgment. Further, it is open to the parties concerned to move the lower appellate Court for any interim relief, as found necessary, during the pendency of the matter and on such relief being claimed the lower appellate Court is to pass appropriate orders thereon, on merits and in accordance with law.

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The second appeal is ordered accordingly as stated above. No costs. Consequently, connected C.M.P.No.21379 of 2003 is closed.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Subordinate Judge, at Tiruvarur

2. The District Munsif, Thiruthuraipoondi

3. The Record Keeper,
VR Section, High Court, Madras.

+ 1 cc to Mr. Srinath Srideven, Advocate SR No.51305

+ 1 cc to Mr. S. Sathiamurthi, Advocate SR No. 51138

JRG(CO)
SR/19.9.2007

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